

1. Did claimant timely serve his written claim?
2. Did claimant file an Application for Hearing within the prescribed time?

FINDINGS OF FACT

Claimant was injured on December 13, 2005, when he was struck in the right eye with a nail while working for respondent. Claimant was initially seen by Dr. Caroline Chang, who referred her to Dr. Gregory Fox. Dr. Fox diagnosed claimant with hypotony maculopathy, commotio retinae and cyclodialysis and hypotony. Dr. Fox referred claimant to Dr. Michael Stiles, an eye specialist. Respondent authorized Dr. Stiles on or about December 28, 2005. Dr. Stiles first examined claimant on December 30, 2005, and noted that claimant's cyclodialysis cleft with hypotony had resolved spontaneously. In a report to respondent's case manager dated December 30, 2005, Dr. Stiles indicated claimant would have an increased risk of glaucoma "for many years" and would "need to be seen at least once a year by an ophthalmologist to rule out this problem."¹ Claimant continued to be treated by Dr. Stiles regularly for about a year. Each of his appointments was attended by a case manager.

On June 6, 2006, Dr. Stiles reported to Dr. Fox, with a copy to respondent's case manager, that claimant's visual acuity was 20/20 in both eyes, but that he complained of metamorphopsia out of his right eye. Dr. Stiles stated claimant would return for follow-up in six months. Claimant, however, did not appear for his next follow-up appointment with Dr. Stiles until November 28, 2007. Respondent paid Dr. Stiles for the November 28, 2007, treatment on May 30, 2008.

Claimant testified Dr. Stiles told him he would need to have his eye checked every year for 20 years. Whenever he went for a follow-up, Dr. Stiles' office would give him an appointment card giving the time and date of his next visit. On December 9, 2008, claimant returned to Dr. Stiles for his annual follow-up visit. He complained he had trouble reading. Dr. Stiles' office forwarded the bill for treatment to respondent's case manager on December 9, 2008. On January 9, 2009, the case manager sent Dr. Stiles a notice stating it was "unable to consider this billing for payment" because "no medical report" was attached.²

Claimant believed Dr. Stiles was his authorized treating physician, and he continued to see Dr. Stiles on an annual basis in 2009, 2010 and 2011. At the preliminary hearing, claimant had an appointment card wherein he was scheduled for a follow-up appointment with Dr. Stiles on November 12, 2012. There is no evidence as to whether the bills for treatment were paid or, if they had, who paid them. Claimant testified he had never paid for his treatment with Dr. Stiles. There is a claim form from Dr. Stiles for claimant's appointment on November 18, 2011, which was sent to respondent's insurance carrier on November 22, 2011.

¹ P.H. Trans., Cl. Ex. 2 at 19.

² *Id.* at 36.

Dr. Stiles' office did not tell claimant he had not been authorized to have treatment. Respondent provided no evidence that it notified claimant medical treatment was no longer authorized. Claimant's Application for Hearing was filed on May 18, 2012.

ANALYSIS

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The first issue raised by respondent is that claimant did not file a timely written claim pursuant to K.S.A. 44-520a. The written claim was filed on May 17, 2012. Prior to the filing, claimant last saw Dr. Stiles, the authorized treating physician, on November 18, 2011. In order to determine whether the claim was timely, this Board Member must determine whether the 2011 visit by claimant to Dr. Stiles qualified as "payment of compensation." There is no dispute in the record that Dr. Stiles was authorized to treat claimant's injuries beginning December 30, 2005.

If an employer is on notice that an employee is seeking treatment on the assumption that treatment is authorized by the employer, the employer is under a duty to disabuse the employee of that assumption if the employer expects the 200-day limitation to take effect.³ There is no evidence in the record that respondent ever told claimant that it would no longer authorize Dr. Stiles. As such, Dr. Stiles continued to be claimant's authorized treating physician on November 18, 2011.

In *Blake v. Hutchinson Manufacturing Co.*,⁴ the Kansas Supreme Court stated: "[I]t is well established that 'The furnishing of medical aid to an injured employee constitutes the payment of compensation so that a claim filed within due time of the date when the last medical aid was furnished claimant by respondent was filed in time.'" At the time of claimant's last examination, there was never a discontinuation of treatment by Dr. Stiles.

³ *Shields v. J.E. Dunn Const. Co.*, 24 Kan. App. 2d 382, 385-86, 946 P.2d 94 (1997), citing *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 515, 516 P.2d 1008 (1973).

⁴ *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 512, 516 P.2d 1008 (1973) (quoting *Bishop v. Dolese Brothers Co.*, 155 Kan. 288, Syl. ¶ 2, 124 P.2d 446 [1942]).

Claimant's testimony that Dr. Stiles notified the employer of the annual examinations is undisputed.

The second issue raised by respondent in its brief is that claimant did not file a timely Application for Hearing with the Division of Workers Compensation pursuant to K.S.A. 44-534. K.S.A. 44-557 requires the employer to report accidents with the Division within 28 days of an accident. Division records reflect that no such report was filed in this case for this date of injury. As such, pursuant to K.S.A. 44-557(c), the requirement for claimant to file an application is stayed. In addition, the time to file a claim for compensation is extended to one year from the last day of treatment authorized by the employer.

CONCLUSION

Based upon the foregoing this Board member finds that at the time of the preliminary hearing, Dr. Stiles was the authorized treating physician; that claimant filed a written claim within 200 days of the last date of authorized treatment; and that the employer failed to file an injury report within 28 days of the date of accident, thereby temporarily staying the requirement to file an Application for Hearing with the Division.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated October 31, 2012, is affirmed.

IT IS SO ORDERED.

⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2011 Supp. 44-555c(k).

Dated this _____ day of January, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge